October 14, 2022

Dear WISH Seminar Participants,

I look forward to discussing my work-in-progress, "Acknowledging Natural Punishment" with you. This paper is a follow-up to a paper I've already written on the topic. The former paper merely attempted to explain natural punishment and to explain how it could fit within the architecture of American criminal justice. This new paper hopes to explain why states have a duty to implement my proposal with respect to natural punishment.

Because of the great overlap in the papers, there is a good deal of copy and pasting, and my citations are a bit of a mess and mix of styles. Please forgive that.

Also, the paper is unfinished. The last section was initially composed of many scattered thoughts, that ran well beyond the 8,000-word limit. Instead of completely cutting these out, I have left the headings so that you have an idea of what I hope to discuss there.

Looking forward to meeting with all of you,

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# ACKNOWLEDGING NATURAL PUNISHMENT

Raff Donelson

It is illegal to operate a motor vehicle while impaired by an intoxicating substance such as alcohol or marijuana. Suppose that someone flouts that law, drives drunk, and then crashes their car into their own house, injuring themselves and damaging their property. Supposing that the state can prove that this happened, should the state still impose some additional adversity upon the driver to serve as a punishment?

I am inclined to think that the state should impose either no additional adversity or, at least, far less than it should bestow upon the drunk driver who sustains no injuries and who does not damage their own property. I am so inclined because I tend to think that the original drunk driver with injuries and house with a car-shaped hole in it has already been punished (and perhaps already punished enough). The punishment received was not an *intentional punishment* like fines, incarceration, or the gallows, but a *natural punishment*.

This paper defends the thesis that states ought to acknowledge natural punishments when doling out sentences for criminal wrongdoing.[1] To defend this, I first must clearly define *natural punishment*. That is the task of §1. Next, in §2, I clarify the proposal in various ways. After these preliminaries, I begin the work of defending the thesis in §§3-5. I argue in §3 that the dominant justificatory theories of punishment all suggest that states should acknowledge natural punishment. In §4, I raise and respond to possible criticisms of my thesis. In §5, I consider, but do not resolve, other moral and political questions surrounding this purposal with the aim of spurring new lines of inquiry.

Before beginning the paper in earnest, it is important to address one sense in which the foregoing effort is a bit unusual. This is a normative paper about the criminal process with trans-jurisdictional scope. The paper, if successful, shows that all jurisdictions, from South Africa to Russia, Chile to China have an obligation to consider natural punishments when sentencing a criminal defendant. Most essays about the criminal process are tied to particular jurisdictions in part because issues of criminal procedure are sometimes seen as so technical that one can only speak with other experts who understand the niceties of the criminal process in one's own nation or province. This is in sharp contrast to normative work about substantive criminal law, that is, work about what conduct a state should criminalize and which conditions are justifying or excusing. In that arena, various scholars, many without formal training in law, speak freely across borders about the cases for and against criminalizing drug use, abortion, female genital mutilation, having more than one biological child, and all manner of other things. Just as moral philosophers, political theorists, and others have insightful things to say about the proper direction of the substantive criminal law without regard to jurisdiction, I hope that the same can be true of the criminal process and that this paper can be an example.

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[1] This paper, thus, fulfills a promissory note from my prior paper, "Natural Punishment." Raff Donelson. "Natural Punishment." *North Carolina Law Review* 100, no. 2 (2022): 557–599. In the earlier paper, I merely sought to clarify the notion of *natural punishment* and to explain how acknowledging natural punishment would be consistent with the general tenor and ground rules of the American criminal justice system. I explicitly declined to offer a normative case for acknowledging natural punishment.

## 1. Defining Natural Punishment

To understand my proposal that states acknowledge natural punishment, I must first define the notion. Though a clearer definition follows, I see natural punishment as bad things that happen to a wrongdoer as a result of her wrong, and not as a result of someone trying to punish the wrongdoer. Cases of *poetic justice* are, more or less, what I have in mind.[2]

I begin my effort to make the notion clear by offering a few more cases. The cases are introduced for three reasons. First, they allow a reader to form an intuitive sense of natural punishment. I suspect that many of us have a pre-theoretic understanding of the notion, such that my work in this section is largely just clarifying an idea that we already have. Second, when I provide the definition below, the examples will help to breathe life into the terms. Third, offering a range of cases allows for a fairer appraisal of the arguments to come. Some instances of natural punishment feature particularly sympathetic wrongdoers, and populating a paper with these examples alone may mislead a reader about the level of controversy this proposal entails. Later, in the paper, I explicitly take on the challenge that the state should only acknowledge some kinds of natural punishment.

After the cases, I offer a definition of natural punishment and then mention some ways in which my characterization of natural punishment is a stipulation.

### 1.1 More Cases

Below are a few more cases of natural punishment drawn from real events.

Terrion Pouncy was an unlucky criminal. Armed with a .38 caliber pistol, Pouncy robbed Maxwell Street Express, a hot dog stand in Chicago, Illinois.[3] After stealing money, two employees' phones, and the employees' wallets, he took off running. While in flight, he accidentally triggered the pistol in his waistband, shooting himself in the penis.

Brittany Stephens was a passenger in a small SUV, an overcrowded small SUV at that.[4] The vehicle had seats for five, but, on a fateful October day in Baton Rouge, Louisiana, it held eight people: four adults and four children, including Stephens's infant daughter. Irresponsibly and illegally, Stephens placed her baby in a car seat and wedged the car seat between the front two seats on the center console. Christopher Manuel, an off-duty police officer, was driving recklessly, at ninety-four miles per hour

[2] But not exactly. Poetic justice, as the name implies, is always just; whereas, a natural punishment can be too harsh or too lenient.

[3] David Moye, *Man Shot Himself in Penis While Robbing Hot Dog Stand, Police Say*, HUFFPOST, (Nov. 3, 2017, 1:04 PM), https://www.huffpost.com/entry/shoot-penis-hot-dog-stand_n_59fc8f64e4b0b0c7fa39d30f

[4] Julia Jacobo & Barbara Schmitt, *Louisiana Mother Charged with Killing 1-Year-Old Daughter in Car Crash She Didn't Cause*, ABC NEWS (Mar. 1, 2018, 4:47 PM), https://abcnews.go.com/US/louisiana-mother-charged-homicide-crash-killed-year-daughter/story?id=53437927

when the speed limit was fifty.[5] He struck the SUV, killing the infant. Stephens was charged with negligent homicide for failing to properly secure the car seat, which contributed to her baby's death.[6]

In 2011, a young German medical professional, by her own negligence, gave a patient the wrong blood for a blood transfusion.[7] The patient consequently died. The medical professional was, in turn, charged with negligent homicide. Following the patient's death, the young medic suffered a severe nervous breakdown, requiring medical attention, and she was completely unable to work for months.

Ernest Johnson should have left his estranged wife alone; there was a protective order telling him to do as much.[8] In Fall 2018, Johnson violated the order and went to the home that his estranged wife shared with her new boyfriend—with a Molotov cocktail in hand. Johnson hurled the cocktail at the door, hoping to set the house ablaze, but instead, it bounced back at him, engulfing the forty-three-year-old man in flames.

These are just few cases to give the reader a sense of what I have in mind.

### 1.2 A Reductive Definition

With these real-world cases in tow, I now offer a definition. *Natural punishment*, as defined here, refers to any sufficiently serious adversity resulting from a wrongdoer's misconduct without the intervention of anyone intending to cause retributive harm to the wrongdoer. Thus, three conditions define the notion: (1) adversity, (2) caused by wrongdoing, and (3) not caused by anyone's intention to exact retribution on the wrongdoer.

A note of clarification about retributive harm is in order. *Retribution* has at least two senses, a weak sense and a strong sense.[9] In the weak sense, retribution only requires the aim of getting back at someone for a wrong. In the strong sense, retribution names some theory that attempts to justify imposing punishment. When we discuss retribution in the strong sense, notions about proportionality and the requirement to limit punishment to the perpetrator and not, say, her kith and kin, emerge.[10] Retribution in the strong sense attempts to explain how and when it is permissible (and perhaps required) to exact retribution in the weak sense. With that in mind, I can raise and quickly dispatch a worry about the third element of natural punishment. One might worry that, on my version of natural punishment, a utilitarian vigilante mob who beats up a wrongdoer might count

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[5] Ellyn Couvillion, *Off-Duty Baton Rouge Police Officer Going 94 mph in Crash that Killed 1-Year-Old Baby, Police Say*, ADVOCATE, (Feb. 16, 2018, 3:21 PM), https://www.theadvocate.com/baton_rouge/news/crime_police/article_68f0a8ba-135f-11e8-a469-1f2229e20faf.html

[6] Lea Skene & Grace Toohey, *Experts Question Mother's Arrest in Crash that Killed Baby; Off-Duty Cop Going 94 mph Remains on Paid Leave*, ADVOCATE (Feb. 28, 2018, 11:54 AM), https://www.theadvocate.com/baton_rouge/news/crime_police/article_7c7f4602-1cb0-11e8-a723-0bc2db424e30.html

[7] Amtsgericht Köln [AG Köln] [Cologne District Court] May 16, 2012, 613 Ls 3/12 (Ger.), https://openjur.de/u/2199753.html

[8] Michelle Hunter, *Man Burned While Trying To Set Fire to Home of Estranged Wife's Boyfriend: JPSO*, NOLA.COM (Oct. 16, 2018, 8:15 PM), https://www.nola.com/crime/2018/10/man_burned_while_trying_to_set.html

[9] For more detailed discussion, see Raff Donelson, *Cruel and Unusual What? Toward a Unified Definition of Punishment*, 9 WASH. U. JURIS. REV. 1, 37–38 (2016).

[10] Retributive thinking did not always have these sorts of limits. As philosopher Philip Kitcher notes, developing these limits was ethical progress. PHILIP KITCHER, THE ETHICAL PROJECT 140–141 (2011).

as exacting natural punishment because (1) the roughing-up counts as adversity, (2) the wrongdoing obviously plays some causal role in the roughing-up, and (3) the mob does not intend to exact retribution because they are utilitarians, not retributivists. I do not count the mob's actions as natural punishment because they are exacting retribution, just retribution in the weak sense.

The examples from above clearly conform to this definition. I precede condition by condition, starting with the adversity condition. Pouncy obviously suffered a traumatic physical injury, so he had adversity. The same is true of Johnson who suffered the terrible burns. The German medic and the mother suffered adversity in a different way. Their pain was primarily psychical, not just physical. The medic's anguish manifested in other harms, both professional and pecuniary. For all four, these harms are significant.

Next, I turn to the second condition, what I call the *positive causal condition*. Starting with Johnson, his adversity – the burns – were clearly caused by his wrongdoing. Had he not thrown the Molotov cocktail, it could not have bounced back at him. The medic would not have experienced this severe mental breakdown if she did not kill the patient. About hot dog robber, it does seem that his adversity resulted from the wrongdoing, for it seems that his haste in fleeing the scene of the crime caused him to accidentally shoot himself. If he had not held up the wiener stand, he would not have had to hurry away from the scene. In fact, he would not have needed to carry a loaded firearm in the first place. For Stephens, there is a thornier issue of fact. Maybe the child would have died even if properly secured in the vehicle, given the excessive speed at which the police officer drove. If however, we assumed that Stephens's illegal action caused the child's death, as we must assume for her to be liable under the law, then we must admit that the wrongdoing caused her adversity.

Finally, I consider the third condition, what I call the *negative causal condition*. In all four cases, the adversity was not caused by anyone seeking retribution against the wrongdoer. Pouncy was not hoping to maim himself at all; *a fortiori*, he was not hoping to maim himself with retributive purpose. The same is true of Johnson. While there was law enforcement involved in Stephens's adversity, there was no retributive purpose; this was a mere accident. In the case of the medic, one might be inclined to think that she was somehow, maybe even unconsciously, punishing herself with retributive purpose.[11] To believe this requires a homuncular theory of mind that seems odd, but it is possible. If this is the best read of the situation of the medic, then indeed, we do not have a case of natural punishment. Of course, this is not the only understanding of situations like that. In some cases, we would rightly deny the presence of self-punishment, and then, this would be natural punishment after all.

### 1.3 This is Stipulative!

While I think the cases and the definition offered track something intuitive, there is an important sense in which my notion of natural punishment is stipulative. Perhaps one has a slightly different definition that will encompass a broader or narrower set of phenomena. The work of this paper is

[11] There are remarks from Derrida that suggest this way of thinking about natural punishment. Jacques Derrida, *The death penalty*, *vol. 2*, pg 37–39 (Geoffrey Bennington & Marc Crépon, eds., Elizabeth Rottenberg, trans., Univ. of Chi. Press 2016) (2015).

not conceptual analysis, but practical philosophy concerned with developing normative arguments about the propriety of certain ways to conduct criminal sentencing.

There is another way that this effort is stipulative. Though I have termed it *natural punishment*, following the lead of thinkers such as Immanuel Kant,[12] it is no contention of mine that natural punishment is punishment in the metaphysical sense. Some thinkers argue that some happening is not punishment unless it is intentionally administered by some agent,[13] while other thinkers disagree with that.[14] I do not enter that debate with this essay. My point is a practical one that states ought to acknowledge that natural punishment occurs and modify their practices of bestowing intentional punishment, accordingly.

## 2. Clarifying the Acknowledgment Thesis

So far, I have spoken of acknowledging natural punishment, but I have not said about what that entail. This section is where I fill in the details. To acknowledge natural punishment, states must consider the fact that a natural punishment has occurred when it is bestowing intentional punishments. This basically means that states should punish a wrongdoer less when a natural punishment has transpired than when one has not transpired, ceteris paribus. At the limit, the state should refrain from any additional punishment.

Of course, there are many ways that this idea can be implemented. I discuss a few of these below but emphasize one way that I particularly favor. After this discussion, I explain that the proposal is put forward as a requirement of justice, not as a matter of mercy. This constrains some means by which the proposal may be implemented.

### 2.1 Methods of Implementation

If a jurisdiction decides that it will acknowledge natural punishment, it then has a lot of choices. One choice concerns how the punishment discounts are to be made. For instance, the legislature could make a standardized schedule of common injuries and other adversities wrongdoers sustain in the course of criminal activity paired with a list of punishment discounts. When there are allegations that a natural punishment has been sustained, a sentencing court could hear evidence of the natural punishment and then simply apply the punishment discount precisely prescribed by law. At the other end of the spectrum, one could imagine sentencing courts getting wide discretion to fashion appropriate punishment discounts.

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[12] Immanuel Kant, *The Metaphysics of Morals* 105 (1996/1797) (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

[13] *See, e.g.*, H.L.A. Hart, *Punishment and Responsibility*, pg 5 (2d ed. 1968) (asserting that punishment "must be intentionally administered," not accidental); Thaddeus Metz, "Why We Welcome Poetic Justice and Despair at Poetic Injustice," *The Conversation* (June 21, 2017), https://theconversation.com/why-we-welcome-poetic-justice-and-despair-at-poetic-injustice-79771 (claiming that natural punishment is not real punishment because "[p]eople are undergoing harm or discomfort, but these bads are not being intentionally inflicted by an agent to censure wrongdoing, a straightforward understanding of punishment").

[14] Adam J. Kolber, "Unintentional Punishment," *Legal Theory* 18(1): 7–10 (2012)

Another choice concerns publicity. For instance, if prosecutors know that the wrongdoer suffered a significant natural punishment, such that any additional punishment would be excessive, perhaps they will forgo pursuing a criminal conviction in order to preserve resources. On the other hand, maybe a jurisdiction will require prosecution to bring forward these cases so that the government can formally acknowledge that a natural punishment stands in the place of an intentional punishment.

Jurisdictions will have to decide when natural punishment concerns can be raised. Maybe they can be raised only if the criminal defendant pleads guilty to some crime at the outset. Maybe they can be raised even if the defendant initially claimed innocence of any wrongdoing. Maybe they can be raised about foreseeable natural punishments in the future that stem from the crime at hand.[15]

There are also questions of who bears the burden of proving that a natural punishment has occurred and of the amount of evidence needed to prove it. There are tough questions about whether this should be subject to appellate review and how much deference to afford the trial court.

Some jurisdictions that already acknowledge natural punishment, only do so for certain classes of offenders and for certain crimes. Some jurisdictions only allow one to raise a natural punishment claim when the natural punishment would be sufficient to absolve the state of its duty to punish; under such regimes, there are no reductions; either the naturally punished wrongdoer walks free or gets the full sentence she otherwise would receive. In my preferred version of implementation, this would not happen. Because punishment comes in degrees, there should be reductions. Also, I would make natural punishment pleas available in all cases where a natural punishment could occur. Granted, it may be hard to prove the positive causal condition for certain sorts of crimes, but where one can, punishment discounts should be in place.

In what follows, I offer a way that I would like to see the proposal implemented, using the real-world example of Isaiah John Gellaty. In Happy Valley, Oregon, Gellaty stole a car and led police on a colorful chase.[16] After police had flattened the car's tires, Gellaty began losing control of the vehicle. Gellaty artfully bailed out of the car, which was still in motion, and took off on foot. However, he took an unfortunate path: he tried to run in front of the car, which was still in motion. The car hit him, breaking his leg and pinning him against a wall. Police found him there moments later.

If the proposal of this Article were accepted, the criminal process would proceed as normal with an initial investigation, followed by arrest, the filing of charges, and so on. There would be the typical pretrial motions: Gellaty's attorneys would seek to exclude various things from evidence and so on. Supposing that the case progressed to trial, a trial would take place as normal with the factfinder aiming to discover whether Gellaty committed the wrongs of which he was accused.

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[15] See, Raff Donelson. "Natural Punishment." *North Carolina Law Review* 100, no. 2 (2022): 584-85.
[16] Stephanie Officer, *Alleged Thief Tries To Escape Cops, Gets Pinned by Car He Was Driving*, INSIDE EDITION (November 25, 2018), https://www.insideedition.com/alleged-thief-tries-escape-cops-gets-pinned-car-he-was-driving-48703

The sentencing stage is where my proposal would make the most obvious difference. During a sentencing hearing, the defense would bear the burden of proving that Gellaty had already faced natural punishment for his legal wrongdoing and that this should entitle him to some punishment discount. If the court is persuaded of this by preponderance of the evidence, it must take this into account when levying his sentence. For instance, suppose there is a maximum sentence for Gellaty's crimes, car theft and resisting arrest. If that were, say, five years of incarceration, Gellaty should not receive that full sentence. Instead, he should receive some reduction because of the natural punishment. I am indifferent as to whether there should be a standardized schedule versus more room for individualized attention from the sentencing court.

If Gellaty does not receive a reduction, even after persuading the court that natural punishment occurred, he would have grounds for appeal. He could claim that he has received a larger punishment than the criminal statute permitted, or he may alternatively claim that the punishment would violate his right against excessive punishment, if the punishment is still not beyond the statutory limits.

When the process works well, without need for appeal, the sentencing court would announce that the natural punishment is part of the official sentence. Its formal acknowledgement that a given instance of natural punishment shall count as punishment for legal purposes would be made in order to guide others in their conduct and to communicate the state's disapproval.

### 2.2 A Matter of Justice, Not Mercy

As I argue in more detail below, this proposal is made in the spirit of justice, not on the basis of mercy. When someone, like a head of state, pardons a wrongdoer, this is typically done on the basis of mercy. The punishment reduction is not something *owed* by the state; it is *gift* from the state.

Of course, as it actually happens, some individuals receive disproportionately harsh sentences such that a pardon is actually deserved.[17] But in the standard case, mercy is supererogatory. If, as I claim below, natural punishment already achieves the purpose of punishment, in whole or in part, the state no longer has the same right to punish. That right has been extinguished in whole or in part. Thus, justice will demand that the state refrain from excessive punishment.

## 3. What Punishment Theory Says

Having clarified what it means for a state to acknowledge natural punishment, now I finally make the case for why states, as a matter of justice, ought to do so. The argument is simple. All justificatory theories of punishment claim that punishment may be imposed if the punishment serves some specified end – giving someone her just deserts, deterring future wrongdoing, etc. Natural punishments can serve those ends, so the state is at least permitted to let a natural punishment stand as the state's punishment for a crime. The next step is to note that any plausible justificatory theory of punishment holds that there are proportionality constraints, that is, limits on

[17] Beccaria discusses this. Cesare Beccaria, *On Crimes and Punishments*.

how much punishment a state can bestow for a crime. For instance, though the state will deter the barroom brawler from punching people again by cutting off one of her hands, this is a disproportionate punishment. Likewise, if the natural punishment achieves the specified end, it is disproportionate to levy additional adversities. Also, if the natural punishment along with some amount of intentional punishment already would achieve the end, bestowing any additional intentional punishment is disproportionate.

That is the outline for the proceeding argument. In what follows, I need to fill out the details. I discuss five main theories of punishment and show that a proponent of each should admit that natural punishment can fulfill the purposes set by their preferred theory. If so, any additional punishment would be unwarranted.

### 3.1 Deterrence Theories

First, I consider deterrence theories. *Deterrence* names a family of theories. All of them contend that punishment for a crime type X is justified insofar as it deters some set of wrongdoers from committing X in the future. Classically, there are specific deterrence theories and general deterrence theories. Sometimes thinkers lump the incapacitative theory in with these. Below, I discuss how natural punishment can achieve all of these purposes. Before getting to that, however, one must note something at the outset.

On whatever deterrence theory one prefers, one cannot reasonably contend that any punishment is justified just so long as the punishment deters the crime. Deterrence comes in degrees. A lengthy prison sentence – maybe fifty years – will surely deter many people from jaywalking, but that seems wildly disproportionate. Thus, many deterrence theorists begin with specifying the proper quantum of deterrence and then they contend that, if a punishment achieves the requisite amount of deterrence, any additional punishment is unjustified.

With that point about proportionality noted, I now turn to specific deterrence theories of punishment. As traditionally understood, on this type of view, punishment is justified insofar as it deters the wrongdoer in question from committing that wrong again. One can broaden the view to claim that punishment is justified insofar as it *prevents* the wrongdoer in question from committing that wrong again. The difference between the broad and more traditional understandings is that one can prevent a wrongdoer from reoffending in multiple ways; deterrence is one specific strategy—offering a negative incentive. An incapacitating punishment prevents reoffending, but it is not quite right to claim that it *deters* reoffending. Whether construed broadly or narrowly, natural punishment can fulfill the role of making it less likely that the wrongdoer reoffends. Pouncy, the wiener bandit, may well desist from robbing people after his accident. Were his accident worse, he might have been completely disabled from walking again and that natural punishment would ultimately end his robbery days, whether he wanted it or not.

Next, consider general deterrence theories. On this type of view, punishment is justified insofar as it deters others—not the wrongdoer in question—from committing the same kind of wrong. At first glance, one might doubt that natural punishment can serve as a general deterrent, for would-be

criminals might see natural punishment as a fluke accident that only befalls fools or the ill-fated, not themselves.[18] To put the worry more concretely, would-be robbers might disregard the injuries sustained by Pouncy because people typically keep their appendages intact while committing robberies. To respond to this worry, I must admit that some will be inclined to "roll the dice"[19] and risk incurring a natural punishment. Of course, as economists are wont to say, there are always persons at the margin. There is someone who will respond to this incentive, who will see others' natural punishments as a warning about what could happen to them. Of course, this is true about intentional punishment too. One is unlikely to be detected and punished for stealing a bicycle,[20] but it may well be that the penalty for bike theft deters some folks from engaging in this behavior. In this way, natural punishment is no different from intentional punishment: both provide general deterrence but provide it imperfectly.

The question, then, is not whether natural punishment can serve as a general deterrent. It can. The question is, once one has settled on the proper amount of deterrence for a crime, whether natural punishment can provide a non-negligible amount of general deterrence such that the state should reduce the amount of intentional punishment it would otherwise bestow to gain the desired quantum of deterrence. I can see no principled reason for skepticism on this score.

### 3.2 Rehabilitative Theory

Second, consider the rehabilitative or educational theory offered by many thinkers from Plato onward. On this view, punishment is justified insofar as it makes the wrongdoer a better person. On Plato's view, wrongdoing results from normative ignorance. Punishing someone teaches them right from wrong. Natural punishment could plausibly perform this function, or at least, perform it just as well as could a term of imprisonment. At sentencing, the wrongdoer would be told that her action was wrongful and that the adversities that she has suffered should be an indication of the degree of wrongfulness of her actions.

It seems obvious that natural punishment can play this role when one considers cases like that of Brittany Stephens, the mother who lost her child in a car accident. It would be entirely normal for someone like Stephens to say, after losing her child, that *now* she really sees why we have these rules about car seat placement. If we ignore these rules, tragedy can result.

### 3.3 Communicative Theories

Next, I turn to expressive or communicative theories of punishment. On this type of view, punishment is justified to the extent that it communicates to the wrongdoer (and perhaps also to the wider society) that the

[18] James Duffy, *Roll the Dice, Rational Agent: Should Extra-Curial Punishment Mitigate an Offender's Sentence?*, 31 U. QUEENSL. L. J. 115, 126 (2012).
[19] James Duffy, *Roll the Dice, Rational Agent: Should Extra-Curial Punishment Mitigate an Offender's Sentence?*, 31 U. QUEENSL. L. J. 115, 126 (2012).
[20] *See* Casey Neistat, '*Bike Thief*,' N.Y. TIMES (Mar. 20, 2012), https://www.nytimes.com/2012/03/13/opinion/bike-thief.html

wrongdoer's act was wrong.[21] While some respected voices have expressed doubt as to whether natural punishment can play this communicative role,[22] it surely can, provided that natural punishments are adequately publicized and correctly framed by authorities. For example, the Stephens tragedy, if widely publicized, would undoubtedly communicate to society the danger of failing to properly secure a car seat. Also, it is not as if intentional punishments automatically play the proper communicative role. They also need to be adequately publicized and correctly framed by authorities, else people will not know what the state seeks to communicate.

### 3.4 Retributive Theories

I consider retributivism. Above, I spoke of retributivism in the strong sense—that is, retributivism as a theory that justifies punishment by adverting to just deserts. According to retributivists, wrongdoers simply deserve some amount of hard treatment or deprivation for their wrongs. Because natural punishment can serve as that deprivation, it is consistent with retributivism.[23] As two prominent retributivists put it, "it may be that the human practice of punishment relies on a combination of censure and suffering, but what retributive desert itself requires is just the suffering."[24]

In a sense, retributive theories are most friendly to this proposal; however, retributivists are often also committed to the idea that the punishment must come from someone who has authority to levy punishment. On my way of implementing the acknowledgment proposal, the state would still exercise its power insofar as it must declare that the natural punishment will stand for the intentional punishment that would otherwise be bestowed. It is hard to see what of normative significance would remain undone.

### 3.5 The Reconstructive Theory

Finally, I consider the reconstructive theory of punishment. On this view, punishment is justified insofar as it reestablishes the empirical validity of a community's norm.[25] When someone flouts the community's norm, the norm falls into doubt: it is unclear that the norm is operative, or as Kleinfeld puts it, "actualized," anymore. When the community punishes, it reestablishes the norms as operative. Punishment not only *communicates* that the community obeys this norm; punishment speaks that obeisance into being. Punishment

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[21] *See* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 401–04 (1965); Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 111, 129–33 (Jeffrie G. Murphy and Jean Hampton eds., 1988); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1691–92 (1992); R.A. DUFF, TRIALS AND PUNISHMENTS 64–73, 254–62, 268–77 (1986); R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 80–83 (2001); M. Margaret Falls, *Retribution, Reciprocity, and Respect for Persons*, 6 LAW & PHIL. 25, 45–46 (1987); Igor Primoratz, *Punishment as Language*, 64 PHIL. 187, 188–91 (1989); Thaddeus Metz, *Censure Theory and Intuitions About Punishment*, 19 LAW & PHIL. 491, 494–96 (2000); Joshua Glasgow, *The Expressivist Theory of Punishment Defended*, 34 LAW & PHIL. 601, 602–11 (2015).

[22] R.A. Duff, *The Intrusion of Mercy*, 4 OHIO ST. J. CRIM. L. 361, 367 n.16 (2007) ("[I]t is hard to see how [natural punishment] could serve the ends of communicative punishment.").

[23] For retributivists saying as much, see LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, REFLECTIONS ON CRIME AND CULPABILITY: PROBLEMS AND PUZZLES 200–04 (2018).

[24] *Id.* at 182.

[25] *See, e.g.*, Joshua Kleinfeld, *Reconstructivism*: *The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1545 (2016).

is a kind of performative, in J. L. Austin's sense.[26] Just as with the expressive theories of punishment, I contend that natural punishment may fill this role, so long as the natural punishment is adequately publicized and correctly framed by authorities.

## 4. Objections and Replies

In this portion of the essay, I consider four objections to the proposal and attempt to answer them.

### 4.1 "This seems infeasible"

For those unfamiliar with proposals such as mine, an initial response is that this seems unwieldy or otherwise infeasible. How, one might ask, are courts supposed to figure out how much intentional punishment to withhold given a defendant's mangled penis, dead child, or charred body. This is a natural worry, for time in prison – a familiar intentional punishment – can seem wholly incommensurate with these other adversities.

Of course, the best proof that a plan is feasible is seeing it actualized. As it happens, there are jurisdictions that already discount intentional punishment when a natural punishment has occurred. Germany, Australia, and Sweden are just a few nations where this already happens.[27]

### 4.2 "Even if this feasible, its benefits do not outweigh its costs"

Even if one acknowledges that this proposal is something that a state could do, one still might doubt whether implementing this idea is cost-justified. There are at least two different ways of worrying about this. One might doubt that courts should give any time to making sure that the naturally punished are not over-punished. Alternatively, one might doubt that there is sufficient utility in having full-dress trials and sentencing hearings, if the defendant has been naturally punished already. I explore each of these contentions.

First, I turn to the thought that states should simply accept over-punishing the naturally punished. While this may seem callous and obviously wrongheaded, there is a grain of truth about this kind of concern. There may well be a precise quantum of punishment that each person needs to receive to achieve the purpose of punishment on one's preferred theory; however, there is little reason to expect that courts regularly get this right because the people running the courts, just like all of us, have limited time, patience, cognitive abilities, and other resources. It is also likely that if courts were to expend more of those precious resources trying to get one person's punishment more accurate, there would be greater errors elsewhere, perhaps for someone else. Putting it absolutely concretely, if a judge is in a sentencing hearing all day with one defendant, another person waiting in pretrial detention may have to wait longer for their case to begin, and perhaps that detainee is factually innocent and will be acquitted and that acquittal is being forestalled. The easy answer is that the state

[26] *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 4–5 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975) (isolating explicit performatives as utterances that are not true or false and that are a part of an action which is more than simply saying something).

[27] For commentary, see Raff Donelson, "Natural Punishment," *North Carolina Law Review*.

should just expend more resources to avoid wronging either party, but demanding more resources is easy; making more resources is hard.

My only response here is to note that the polity that truly cannot expend the necessary resources to avoid over-punishing or doing some other grave harm is in a difficult situation. It may well be that such a polity can only act wrongly, and it must choose the lesser evil. Because this essay addresses many sorts of nations with very different material conditions, all I can say is that many nations do have the capacity to implement this proposal. Those without the capacity still have a duty not to over-punish, but they must balance that against other duties. Nothing more can be said without considering the particulars of that situation.

The second way of hearing this concern about the proposal not being cost-justified is to think about my specific implementation strategy, which would involve a proceeding to establish guilt and then a separate proceeding that would formally acknowledge the natural punishment. One might think that this is not cost-justified when the state already knows that the natural punishment was so severe that any additional punishment would be excessive. Leaving to one side the polity that simply could not afford to implement the proposal in this manner, those other polities have to consider their own preferred justificatory theory of punishment and let that be a guide here. If one is fond of theories which require the state to communicate its disapproval or communicate that wrongdoers will face consequences, then it imperative that the state expend resources to achieve the implementation I suggest. If one only cares that the wrongdoer receive her just desert, the value of a public hearing diminishes. I tend to favor justificatory theories of punishment that are more public-facing and communicative; that is one reason why I prefer the implementation strategy mentioned above. Also, I prefer an implementation strategy that would be effective on a wide variety of justificatory theories because most societies are pluralistic, with persons of various political perspectives.

### 4.3 "Only some cases merit less intentional punishment"

This essay prominently features four main real-world cases of natural punishment. Not all of the wrongdoers are equally sympathetic, and the adversities that each faces are very different. One might contend that only some of these wrongdoers merit less punishment in light of the natural punishment.

For instance, one might think that Stephens who lost her child has certainly been punished enough. One might further argue that her adversity is tied to recognizing her wrongdoing in a way that the pain experienced by Pouncy or Johnson is not. There is something intuitive about this, and yet it is conjectural. Perhaps Stephens or someone else in her shoes faces this inexpressibly awful situation completely unrepentant. Maybe she is just mad at the off-duty officer. By contrast, maybe Pouncy, after sustaining his injuries, faces a change of heart and resolves never to rob anyone again.

The larger moral here is as follows. One might implicitly endorse a particular justification of punishment – say, the rehabilitation theory – and on that theory, some natural punishments are not enough to achieve the intended purpose of punishment. That may well be. That is not a problem with the proposal, much less does this justify any categorical approach to which kinds of adversity

should allow a wrongdoer the opportunity to bring up natural punishment at sentencing. If one has a theory of what punishment is for, one should use this to determine how much adversity a person should receive, and then one should conduct an inquiry, looking into the specifics of each person's situation to determine how much a natural punishment has helped toward achieving that purpose.

### 4.4 "This will benefit the wrong people"

One might worry that instituting my proposal could lead to unjust results: criminals with prestige or power to lose might, because of those advantages, be enabled to seek greater punishment discounts than their less esteemed, powerless peers. Call this the Brock Turner problem.[28] (While Turner did not receive his light sentence due to any natural punishment he faced, one can imagine a nearby possible world in which a natural punishment argument influences a judge who is overly-sympathetic to upper-class White male offenders.) The Brock Turner problem can be addressed; we just have to think through how much discretion judges should have with respect to the sentencing discounts.

## 5. New Questions

### 5.1 Are other harms mitigating?

### 5.2 What does this say about interpersonal relations?

### 5.3 What to say to abolitionists?

[28] Turner was a Stanford undergraduate student convicted of sexual assault, but a judge sentenced him to just six months of incarceration. *See* Kristine Ruhl, *Are We Contradicting Ourselves?: How the Stanford Rape Case Illustrates the Conflict Between Mandatory Sentencing and Judicial Discretion*, 22 LOY. PUB. INT. L. REP. 28, 28–29 (2016).